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## NOTES ON DOWER IN PARTITIONING INFANTS' LAND.

Infants' land can be sold under the statute, or upon a proper bill for partition and sale, and it must appear that the sale is to the interest of the infants.<sup>1</sup> Where there is no absolute prohibition, sale will be made in the court's discretion.<sup>2</sup>

In a suit for partition of real estate it is not necessary that there should have been an account of debts against the personal estate of the testatrix under whose will the real estate was derived before there is a decree of sale thereof for partition.<sup>3</sup>

A guardian *ad litem* cannot consent to sale of infants' land;<sup>4</sup> as no such consent could be given by the infants, their rights and interests being under the protection of the court which can alone act for them.<sup>5</sup>

A next friend cannot consent and waive rights of infant as against widow's dower.<sup>6</sup>

## INFANT PARTIES IN PARTITION SUIT.

At common law an infant sued by guardian only.<sup>7</sup> Now, by statute, any minor entitled to sue may do so by his next friend.<sup>8</sup>

The *prochein ami* was introduced by the Statutes Westm. 1, 48 and Westm. 2, 15 upon certain cases of necessity, as (1) where an infant is to sue his guardian for waste, and (2) where he is eloiigned so that he cannot be present in court, as he always must pray a guardian to be assigned him, and it was only in these cases that suing by *prochein ami* was used until a long time after making the statute. But at length it was found more convenient as the infant was not obliged to be in court when the *prochein ami* was admitted. And it is so at this day, for an infant now seldom or ever sues by guardian.<sup>9</sup>

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1. *Snively v. Hardraker*, 29 Gratt. 112.

2. *Talley v. Starke*, 6 Gratt. 339.

3. *Reynolds v. Adams*, 125 Va. 295-307

4. *Dangerfield v. Smith*, 83 Va. 871.

5. *Cralle v. Meem*, 8 Gratt. 830.

6. *Hite v. Hite*, 2 Rand. 409.

7. 1 Minor Inst. 516.

8. Code Va. 1919, sec. 5331.

9. 2 Inst. 261-390; *Slaughter v. Whitlock*, 2 Col. Dec. B-257-258-259.

The statute did not take away the common-law right of the guardian to sue. He still has authority to institute proceedings in equity for partitioning the ward's land.<sup>10</sup> However, where the widow sues as guardian of her wards for partition and her dower, all infants must be made defendants, and guardian *ad litem* assigned to defend them,<sup>11</sup> for the widow's suit for dower may be prosecuted hostilely to the interests of her wards, and, in assigning dower, the court must have regard to the fee simple and the annual value of the land, and the rights of all parties concerned.<sup>12</sup> So where the widow sues as next friend of her infant children for partition of their lands and her dower, a guardian *ad litem* should be assigned the infants.

In the sale of infants' land under the statute of 1832, there was nothing in that statute requiring infants to be made defendants and thus represented by guardian *ad litem*, instead of plaintiffs with their mother suing as their next friend.<sup>13</sup> Now such suit must be brought by the guardian of the infants and guardian *ad litem* assigned infants.<sup>14</sup>

#### DOVER IN GENERAL.

A wife has a *title* of dower; a widow a *right* of dower, before it is set out by metes and bounds, and after it is thus set out, she has an *estate* in dower.<sup>15</sup>

A widow cannot *enter* into her dower by the common law, but is driven to her writ of dower to recover the same.<sup>16</sup>

But by statute in Virginia it is provided: "A widow having a right of dower in any real estate, may recover the said dower, and damages for its being withheld, by such remedy at law as would lie on behalf of a tenant for life having a right of entry, or by

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10. *Zirkle v. McCue*, 26 Gratt. 517; *Ware v. Ware*, 28 Gratt. 670; *Truss v. Old*, 6 Rand. 556; *Frazier v. Frazier*, 26 Gratt. 500; *Walker v. Page*, 21 Gratt. 636; *Lancaster v. Barton*, 92 Va. 623; *Durrett v. Davis*, 24 Gratt. 308; *Redd v. Jones*, 30 Gratt. 125, and *Barton's Ch. Pr.* (2nd Ed.) 587.

11. *Zirkle v. McCue*, *supra*.

12. *Fuller v. Conrad*, 94 Va. 235.

13. *Quesenberry v. Barbour*, 31 Gratt. 490.

14. Code 1919, secs. 5335-5337.

15. *Maxims in Conveyancing* secs. 78-222.

16. 1 Inst. 32b. See 1 Tho. Co. Lit. 601-602.

bill in equity, where the case is such that a bill would now lie for such dower." <sup>17</sup>

Until a widow has dower assigned to her she does not hold any part of her husband's estate as a *tenant* in dower, and cannot have her interest sold under the statute authorizing sale of real estate where held by a tenant by the curtesy or in dower. <sup>18</sup>

A widow is endowable after a divorce *a mensa et thoro*, unless extinguished in the decree of divorce.

In a suit in equity for partition, dower should be first assigned the widow, before partition of the residue. <sup>19</sup> It is error to decree a sale of real estate without first settling the dower right of the widow. <sup>20</sup>

#### DOWER WITHHELD FROM WIDOW.

Generally dower is withheld from widow not alone when relinquished by her, but when she has her jointure, or homestead; where it is barred by the several statutes, or becomes extinguished in a decree of divorce *a mensa*, and also where she has disposed of her contingent dower.

It is not essential to the validity of a jointure, that it should be exempt from any incumbrance by judgments, statutes, mortgages, or bonds; the widow, if evicted of her jointure, having still a right to claim her dower. <sup>21</sup> However, if a widow be lawfully deprived of her jointure, or any part thereof, she shall be endowed of so much of the real estate whereof, but for said jointure, she would have been dowable, as is equal in value to that of which she was deprived. <sup>22</sup>

#### BARRED BY STATUTE.

If any estate, real or personal, intended to be in lieu of dower, shall be conveyed or devised for the jointure of the wife, such conveyance or devise shall bar her dower of the real estate, or the residue thereof, and every provision by deed or will shall be taken to be intended in lieu of dower, unless the contrary intention

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17. Va. Code 1919, sec. 5126. See *Chapman v. Armistead*, 4 Munf. 382; *Moore v. Gilliam*, 5 Munf. 346.

18. *Coleman v. Va. Stave Co.*, 112 Va. 61.

19. *Custis v. Snead*, 12 Gratt. 260.

20. *Hoy v. Varner*, 100 Va. 600.

21. *Ambler v. Norton*, 4 Hen. & Munf. 23.

22. Code of Va. 1919, sec. 5123.

plainly appear in such deed or will, or in some other writing signed by the party making the provision.<sup>23</sup>

Parties, when about to contract the relation of husband and wife, may, by agreement, vary or wholly waive the rights of property which would otherwise result from the marriage.<sup>24</sup> But if such conveyance or devise were before the marriage, without the assent in writing or during infancy of the feme, or if it were after marriage, in either case, the widow may at her election, waive such jointure and demand her dower.<sup>25</sup>

If a wife, of her own free will, leave her husband and live in adultery, she shall be barred of her dower, unless her husband be afterwards reconciled to her, and suffer her to live with him.<sup>26</sup>

#### IN DIVORCE—EXTINGUISHED BY DECREE IN SEPARATION PROCEEDINGS.

While the contingent right of dower is not technically an estate, but is a mere lien which may be released or relinquished, it is still a valuable property right, and the statute intended to confer upon the court the right not only to settle the status of the parties, but the future rights of each in the property of the other. Furthermore, the Court has the right to make decrees concerning the estate of either party, and . . . a decree extinguishing the marital rights of the wife in the husband's property concerns the estate of the husband as well as the contingent rights of the wife.<sup>27</sup>

Where in a suit for divorce for a supervenient cause the property rights of the parties or either of them are put in issue, but are not settled in that suit, as they are rights which might have been disposed of in the divorce suit, the matter is *res adjudicata*.<sup>28</sup>

#### HOMESTEAD HELD OR TAKEN BY WIDOW.

Widow cannot have dower or jointure and a homestead in the

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<sup>23</sup>. Code of Va. 1919, sec. 5120.

<sup>24</sup>. See *Charles v. Charles*, 8 Gratt. 486; *Faulkner v. Faulkner's Ex'ors*, 3 Leigh, 255; 1 Lom. Digt. 423-4.

<sup>25</sup>. Code of Va. 1919, sec. 5121.

<sup>26</sup>. C. V. 1919, sec. 5123; *Stegall v. Stegall*, 2 Brockenborough (U. S. Cir.), p. 256, by Marshall, J., construing the Virginia Statute; *Morello v. Cautalupo*, 111 Atl. Rep. (N. J. Ch.) 255.

<sup>27</sup>. *Gum v. Gum*, 122 Va. 32. Va. Code 1919, sec. 5135, Authorizes Sale of Such Rights.

<sup>28</sup>. *Osborn v. Throckmorton*, 90 Va. 316.

real estate of her husband;<sup>29</sup> but, by deducting the value of her dower or jointure, she may have homestead in personal estate of her husband.<sup>30</sup>

#### WIDOW'S RIGHTS BEFORE DOWER IS ASSIGNED.

A widow entitled to dower before it is assigned, may enjoy the mansion house and curtilage without charge for rent, repairs, taxes or insurance; receive one-third part of the profits of other real estate; and if deprived of the mansion house, may recover it by unlawful entry or detainer.<sup>31</sup>

The widow in Virginia has no longer a right of quarantine. Her occupancy of the chief messuage of her husband may be cut off immediately on assigning dower to her. The object of the statute was to coerce the heir to assign dower.<sup>32</sup> And it was held that she was entitled to hold, occupy and enjoy the property *until her death*, as dower was never assigned her.<sup>33</sup> The heir cannot maintain an action of trespass for a trespass committed on the quarantine lands of the widow, before assignment of dower.<sup>34</sup> possession is exclusive under the statute of the mansion-house and curtilage. See *Carpenter v. Garett*, 75 Va. 134.

#### IN VIRGINIA—PROCEDURE FOR ASSIGNING DOWER.

First: Dower may be assigned as at *common law*;<sup>35</sup> Second: By the heirs, devisees or alienees, or any of them, on *motion* before the court in which the will is probated or administration had,<sup>36</sup> and when confirmed by the court, shall have the same effect as if *made by the heir* at common law;<sup>37</sup> Third: In equity—it being provided by statute that: Nothing herein contained shall be construed to take away or affect the jurisdiction which courts of chancery now exercise on the subject of dower.<sup>38</sup>

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29. Code 1919, sec. 6538.

30. Code 1919, sec. 6541.

31. See Code 1919, sec. 5124.

32. *Simmons v. Lysle*, 32 Gratt. 758.

33. *Hannon v. Hounihan*, 85 Va. 437.

34. *Latham v. Latham*, 3 Call 181. Before dower assigned, widow's

35. Code 1919, sec. 5125.

36. Code 1919, sec. 5125.

37. Code 1919, sec. 5125.

38. Code 1919, sec. 5125.

## AT COMMON LAW.

At common law, the heir has the power of assigning dower, *without resort to any court*, and the act of Assembly does not impair that power. The widow is bound to accept the assignment made by the heir, provided it be a full and just assignment; and in that event, if she persists in holding any more of the lands than those thus assigned, she ought to be chargeable therefor.<sup>39</sup> Unless there be fraud or collusion, an assignment of dower by the heir cannot be collaterally attacked.<sup>40</sup>

The guardian of an infant may assign dower at common law.<sup>41</sup>

Although the Virginia statute in terms authorizes the common-law mode of assigning dower, some more lasting memorial when assigned by the adult heir, or guardian for the infant, than their *parole* should be made of it. And the statute in question, provides when an assignment by the court's commissioners after motion, before the court has been confirmed, it shall have the same effect as if made by the heir at common law.

## ON MOTION BEFORE THE COURT.

A widow cannot move for assignment of her dower;<sup>42</sup> and if made *ex parte* by the court, it is not binding on the heirs.<sup>43</sup>

## IN EQUITY.

Equity has concurrent jurisdiction of dower, though a legal right.<sup>44</sup> However, a widow entitled to dower in the real estate of her deceased husband, is neither a joint tenant, tenant in common or coparcener with the heirs at law, so as to authorize a court of equity to sell the legal estate of the heirs descended to them, and to have her dower assigned to her out of the proceeds, \* \* \* if any heir refuses to give his assent thereto, or if any heir be an infant.<sup>45</sup>

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39. Moore v. Waller, 2 Rand. 418.

40. 1 Ver. 218; 2 Ca. Ch. 160.

41. Truss v. Old, *supra*.

42. Helm v. Helm, 30 Gratt. 404; Moore v. Waller, *supra*.

43. Roper v. Saunders, 31 Gratt. 74.

44. 1 Story's Eq. sec. 624; Code 1919, sec. 5126; Dickenson v. Gray, 100 Va. 526.

45. Hull v. Hull, 26 W. Va. 1; White v. White, 16 Gratt. 264; Casto v. Kinzel, 27 W. Va. 756; Hobeck v. Miller, 44 W. Va. 637.

Although a bill does not lie by a doweress to have sale made of lands to commute her dower, yet a defendant entitled to partition may, by cross-bill upon a proper showing, ask to have the land sold for the purpose of partition as well as assignment of dower.<sup>46</sup>

A widow may file a bill in equity for her dower where there is a lien paramount to her dower.<sup>47</sup> Such a suit was construed to be the equivalent of a suit by lien creditors to recover their debts by a sale of the land.<sup>48</sup>

#### DOWER IN DIVISIBLE AND INDIVISIBLE LANDS.

It is error to decree a sale of real estate without first settling the dower right of the widow.<sup>49</sup>

A widow is entitled to a life estate in one-third of all the lands of which her husband was seized during coverture, without deduction of administration or other expenses and without regard to advancements made by the husband to her, or to devises not made in lieu of dower, or to encumbrances which are not paramount to her dower.<sup>50</sup>

Dower in indivisible lands in a court of equity as in a court of law, must be assigned in kind.

It is not competent for a court of equity in the exercise of its equitable jurisdiction to decree a sale of land in which a widow is entitled to dower and provide her a gross sum in lieu of dower without her consent, however much it may be to the interests of the heirs.<sup>51</sup>

In a number of the States, it is an option of the widow whether she will take a gross sum, or rely upon annual payments during her life. In others, the consent of all parties interested is necessary to the assignment of a gross sum, while in others, it seems that the matter is very much in the discretion of the Court.<sup>52</sup>

In a number of jurisdictions statutes varying somewhat in their

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46. *Kavanaugh v. Shacklett*, 111 Va. 423.

47. *Daniel v. Leitch*, 13 Gratt. 195.

48. *Hoy v. Varner*, 100 Va. 600; See *Morris v. Peyton*, 10 W. Va. 8, a suit by lien creditors in which widow is made defendant.

49. *Hoy v. Varner*, *supra*.

50. 19 C. J. 575, title Dower sec. 362-b; See Code 1919, sec. 5117.

51. 19 C. J., p. 586, sec. 390.

52. 2 Scribner on Dower, p. 644.



terms make a provision for the sale of lands for the purpose of assigning dower.<sup>53</sup>

Generally, in Virginia there can be no commutation of dower without the consent of all parties.<sup>54</sup> After the death of the husband, the heirs, or creditors being entitled to the corpus, the widow to one-third of the income of the same during life, or assignment in kind, she cannot have her dower commuted without the consent of the heirs and the creditors.<sup>55</sup>

#### DOWER RIGHT PARAMOUNT IN DIVISIBLE LANDS.

Where the widow's dower right is paramount to liens and encumbrances, and the land is divisible, she is entitled to an assignment of dower by metes and bounds, unless it is impracticable from the nature of the husband's interest, or from the nature and quality of the property itself, it will of course be dispensed with, and some other mode adopted. But the court is not authorized to substitute a commutation or a compensation in money, merely because dower in kind may prove to be injurious to the heirs.<sup>56</sup>

It is said: "Although there is some authority to the contrary, the prevailing rule is that independent of legislative authority, the courts cannot without the consent of the parties allow or compel the widow to accept a gross sum in lieu of dower."<sup>57</sup>

#### ASSIGNMENT IN KIND IMPRACTICABLE.

An assignment by metes and bounds will be dispensed with where the lands out of which dower is to be assigned are held in common, in which case the dower interest is to be assigned to be held in common with the heir and other tenants.<sup>58</sup> The general rule has been further limited where on account of the nature of the property, as in the case of mines, the separate parcels were indivisible by metes and bounds.<sup>59</sup>

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53. 19 C. J., p. 587, § 391.

54. *Blair v. Thompson*, 11 Gratt. 451—except in on anomalous case.

55. *Harrison v. Payne*, 32 Gratt. 389-391; *Parrish v. Parrish*, 88 Va. 529.

56. *Simmons v. Lysle*, supra.

57. 19 C. J., p. 585, sec. 387.

58. 19 C. J., p. 581, sec. 376.

59. 19 C. J., p. 579, sec. 371.

A store-house not being divisible, dower therein cannot be set off by metes and bounds, but the widow should be assigned one-third of the annual rental value of the property for life.<sup>60</sup>

#### ASSIGNMENT PRACTICABLE IN KIND.

But where the thing is entire as a house, widow may be endowed of so many rooms; in which case passages and stairways may be enjoyed jointly with others.<sup>61</sup> The admitted fact that the dwelling house with the ground covered by its yards is worth three-fourths of the value of the entire property, without more, does not show that dower cannot be assigned by metes and bounds.<sup>62</sup>

#### INTERESTS AND LIENS PARAMOUNT AND SUBSERVIENT TO DOWER.

The wife's dower is liable to be defeated by every subsisting claim or incumbrance in law or equity, existing before the inception of the title, and which would have defeated the husband's seizin. An agreement by the husband to convey, before dower attaches, will, if enforced in equity, extinguish the claim of dower, on the one hand.<sup>63</sup> On the other hand, widow is entitled to dower under a contract even by parole, such as a court of equity would decree performance of at the suit of her husband.<sup>64</sup> And it has been held that widow is entitled to dower when the husband's estate is determined upon his dying without issue, though there be an executory devise of the land over in fee.<sup>65</sup>

#### DOWER CONTINGENT AND CONSUMMATE—MORTGAGES.

If foreclosed in husband's *life-time*, the land sold, and a surplus after payment of the debts secured by the lien remains, by the foreclosure, it has become *personalty*.<sup>66</sup> Hence it was provided by statute: "Where land is bona fide sold in the life-time of the husband, to satisfy a lien or encumbrance thereon, created

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60. 19 C. J., p. 583, sec. 382-b.

61. Parrish v. Parrish, 88 Va. 529.

62. Hume v. Scruggs, 64 Ala. 40.

63. 4 Kent's Com. 49; 1 Lomax's Dig. 2 Ed. 101-102.

64. Rotan v. Rotan, 1 Hen. & M. 92; Stimson v. Thorn, 25 Gratt. 284; James v. Upton, 96 Va. 296.

65. Jones v. Hughes, 27 Gratt. 560-563.

66. 2 Minor Inst., 4th Ed., p. 140.

by deed in which the wife was united or created before the marriage, or otherwise paramount to the wife, she shall have *no right* to be endowed in said land. But if a surplus of the proceeds of sale remains after satisfying the said lien or encumbrance, she shall be entitled to *dower* in said surplus, and a court of equity having jurisdiction of the case may make such order as may seem to it proper to secure her right."<sup>67</sup> (*Italics ours.*)

Although the converted surplus is *personalty*, the use of the words "*dower in said surplus*," was intended evidently to work a reconversion thereof in favor of the widow, if she survive her husband.<sup>68</sup>

In a case where there was a controversy as to priorities between a deed of trust creditor, building contractor's assignee, and wife, the court held: The wife of the grantor in the deed of trust to secure the building fund company, having joined in that deed, the property should be sold out and out, and first applied to the payment of the debt due the company. But she has a *contingent* dower interest in the equity of redemption, and being a party in the suit, and therefore bound by the decree in the cause, the court should make a proper provision to compensate that interest out of the surplus proceeds of sale, if any, *before* any part of it is paid over to the assignee of the building contractor.<sup>69</sup> The land, however, is not liable in the hands of the purchaser, nor is he liable to see to the application of the surplus purchase money, or that an order is entered for the protection of the rights of the wife in event of her surviving her husband.<sup>70</sup> The Court is not called upon, *sua sponte*, to secure the contingent right or title to dower in such surplus, unless the widow asks it.

Where there is a lien paramount to dower, which makes the land the primary fund for its payment, in such case the widow may institute a suit in equity to have the land sold and the debt

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<sup>67</sup>. Code 1919, sec. 5119.

<sup>68</sup>. See Dissenting opinion *Wilson v. Davidson*, 2 Rob. 398; also explanatory note of Revisors of Code.

<sup>69</sup>. *Iaeger v. Bossieua*, 15 Gratt., p. 84; In *Holden v. Boggess*, 20 W. Va. 79, 85, 86, the case was approved, but criticised as to way in which dower interest should be secured.

<sup>70</sup>. *Robinson v. Shacklett*, 29 Gratt. 108.

paid, and to have her dower consummate out of the residue of the purchase money.<sup>71</sup>

It seems that where lands are sold in the life-time of the husband, and surplus proceeds, above the encumbrance or lien thereon paramount to dower right, are in the hands of trustee, that this statute would give the wife a right to apply to a court of equity to secure her title to dower in such surplus, so that she might obtain same, in the event she survived her husband.

If the equity of redemption is not foreclosed in the husband's life-time, so that at his death, it still subsists as an equitable interest in lands, dower may be had therein.<sup>72</sup> But if the land be sold in the lifetime of the husband, the purchaser may relieve himself from a recovery in kind upon paying the widow interest on one-third of the value of the land at husband's death, as provided in sec. 5128 Code of Virginia 1919.<sup>73</sup>

#### UNRECORDED DEED.

An unrecorded deed from husband and wife conveying his land, now conveys the wife's contingent right of dower in the land. The deed need not be admitted to record as to the husband as well as the wife to accomplish this result.<sup>74</sup>

#### DOWER IN MANSION HOUSE.

Unless injustice will thereby be done to the heirs, it is usual to assign the widow the home or residence of the deceased. However, the widow is not entitled as a matter of right to have the mansion house included in the dower assigned her.<sup>75</sup>

#### DOWER COMMUTED WITHOUT ASSENT OF PARTIES.

Where land in which there is a right of dower is sold in a suit in which the tenant in dower is a party, the other parties interested have a right to insist that instead of a sum in gross, one-third of the purchase money shall be set apart and the interest

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71. *Daniel v. Leitch*, 13 Gratt. 195.

72. 2 Minor Inst., p. 140; *Land v. Shipp*, 100 Va. 337; *Dickenson v. Gray*, 100 Va. 526; *Hoy v. Varner*, 100 Va. 600.

73. *Land v. Shipp*, supra; *Dickenson v. Gray*, supra.

74. V. C. 1919, sec. 5211; changing rule of decision under former statute in *Building, L. & W. Co. v. Fray*, 96 Va. 559.

75. *Devaughn v. Devaughn*, 19 Gratt. 529; *Stimson v. Thorn*, 25 Gratt. 284.

thereof paid annually to the tenant in dower during her life.<sup>76</sup> But although there is an absence of specific statutory authority for the proposition that the widow may be awarded a gross sum as dower in the proceeds of sale of land . . . such an award may be made when the circumstances justify it.<sup>77</sup>

Where it is impossible to invest a sum of money at interest sufficient to produce annually the sum to which an annuitant is entitled, the court will adopt some other mode of adjustment that will produce the greatest equality with the least inconvenience . . . and will pay the annuitant the present value of his annuity, when that is as equitable as any other mode which could be adopted.<sup>78</sup> However, the cases are exceedingly rare, and very unusual circumstances must confront the court, which requires the payment of a gross sum in lieu of dower in kind or an annuity.

Sec. 5131 of the Code of Virginia 1919 does not change the pre-existing general rule which requires both the willingness of the widow and the consent of the heirs at law to the payment of a gross sum in lieu of dower. Under analogous circumstances and because of the impossibility of following the general rule, a court of equity can direct a gross sum of money to be paid in lieu of an annuity without the consent of all parties interested.<sup>79</sup>

#### AGE OF COMMUTATION.

Computation is made as of the period of payment, as under the statute widow is entitled to possession of chief messuage and one-third of rents of other lands until her dower is assigned, and the commutation takes the place of an assignment of her dower.

#### DOWER AFTER SEPARATION AGREEMENT.

Except in England where there is an agreement of separation which its courts will specifically enforce, American courts as a rule will not enforce such agreement to live apart, but will en-

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76. *Harrison v. Payne*, 32 Gratt. 389-391; *Blair v. Thompson*, *supra*.

77. *Sheffield v. Cooke*, Am. Anno. Cas. 1918E, 981.

78. *American Nat. Bank v. Taylor*, 112 Va. 1.

79. *Slater v. Slater*, 124 Va. 370. The court in the case provided for investment of one-third, and payment of interest thereon during life to doweress.

force the property rights therein contracted for, between the parties to the agreement.<sup>80</sup>

If the parties separate for cause, and the cause is removed, but one of them declines to renew the cohabitation, this is a desertion of the one refusing from the time of such desertion.<sup>81</sup>

There can be no desertion upon separation by mutual consent,<sup>82</sup> and in the absence of wrongdoing on the husband's part, he may require his wife to return to his bed and board, and her refusal will not only constitute her an obstinate deserter, but will deny to her any right of support from him, notwithstanding the existence of an agreement wherein they have mutually stipulated to live apart. . . . Adultery of wife relieves the husband of liability for the balance due under an agreement for support.<sup>83</sup>

Although the husband would be entitled to be decreed a divorce after separation agreement upon refusal of the wife to renew cohabitation at his request; and, although she would not be entitled to the provision as *alimony* made in the separation agreement for her support, yet it seems the court would not be authorized to decree concerning the estates of the parties, as they had already provided as to that on the separation agreement. And it likewise seems, that if the wife agreed to relinquish her contingent right or title to dower in such agreement, the right of dower consummate upon her husband's death would not attach, —the divorce proceedings not affecting the dower right whether she divorces her husband, or he her in such event.

Where divorced wife after death of husband sued for distributive share in his estate, as she had covenanted never to claim any interest in her husband's estate in a deed of separation, it was held she could not recover.<sup>84</sup>

It has been held that: A deed between husband and wife alone, by which they attempt to dissolve their marital relations, and the wife, who has no separate estate, releases directly to her husband her inchoate right of dower in his estate, for a money

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80. *Mooreland v. Mooreland*, 108 Va. 93.

81. *Alkire v. Alkire*, 33 W. Va. 519.

82. *Bailey v. Bailey*, 21 Gratt. 43.

83. *Devine v. Devine* (N. J.), 104 Atl. 370.

84. *Daniels v. Bendict*, 97 Fed. 367, affirmed 33 C. C. A. 592.

consideration paid by him, is void as to the wife, and upon the death of the husband, she may recover dower in his lands, at law and in equity, without accountability for the money, all of which she had spent in his life-time.<sup>85</sup>

It was said in that case: "The contingent right of dower of a wife in her husband's lands is not a separate estate."<sup>86</sup>

#### DISPOSAL OF CONTINGENT DOWER.

But it is now provided by the statute that: A married woman may dispose of her contingent right of dower.

"A married woman may, by uniting with her husband in a deed or contract, dispose of her contingent right of dower in his real estate; or, if the husband has previously disposed of his interest in real estate in which she is entitled to a contingent right of dower, she may thereafter, but not before, dispose of her contingent right of dower in the same by her sole act as if she were unmarried."<sup>87</sup>

And under this statute it was held that: A married woman may lawfully sell her contingent right of dower in her husband's land and use the purchase money to acquire judgments against her husband.<sup>88</sup>

While at common law a husband could not by contract with his wife, after marriage, release or relinquish his curtesy right in her real estate,<sup>89</sup> or a wife relinquish her dower or other rights in her husband's real estate;<sup>90</sup> or her statutory right to share in the distribution of her husband's personal estate,<sup>91</sup> yet in equity such contracts have been given effect.<sup>92</sup>

#### DEVICES FOR BARRING DOWER, CURTESY AND DISTRIBUTIVE SHARE

No one has yet been able to invent a device, which will deprive

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85. *Land v. Shipp*, 98 Va. 284.

86. *Land v. Shipp*, 98 Va. 284.

87. Code 1919, sec. 5135.

88. *Miller v. Ferguson*, 110 Va. 222.

89. *McBreen v. McBreen*, 154 Mo. 323.

90. *Pinkham v. Pinkham*, 95 Me. 71.

91. *Stephenson v. Osborne*, 41 Miss. 119.

92. *Hilbish v. Hattle*, 145 Ind. 59; *McBreen v. McBreen*, *supra*.

the widow of dower, or the husband of curtesy, by post-nuptial act.

Yet, where the spouse's estate after marriage consists of *personal property alone*, in Virginia, at least, such property may be conveyed to a trustee, in such manner as to enable the grantor to enjoy during life the income therefrom, and to limit the *corpus* to designated persons after the death of the grantor, to the *exclusion of the wife or husband*, as the case may be, and thus, cutting off the *distributive right* of the one in the estate of the other.<sup>93</sup>

#### HAZARDOUS BARGAIN FOR DOWER OF COPARCENER'S WIDOW.

Such a bargain becomes hazardous unless all coparceners join, because at common law where the intestacy is whole, and by statute in Virginia, partial, advancements shall be brought into hotchpot with the estate real and personal descended or distributable.<sup>94</sup>

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<sup>93</sup>. Hall v. Hall, 109 Va. 117.

<sup>94</sup>. See McCoy v. McCoy, 105 Va. 829.